LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 20 1966
JOHN E. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 370

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants,

NELSON G. GRILLS,
Plaintiff and Appellee,

vs.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES E. NOLAND,
As Members of the Indiana State Election Board, Defendants and Appellees.

APPELLANTS' JURISDICTIONAL STATEMENT.

BENJAMIN G. COX,
701 Merchants National Bank Bldg.,
Terre Haute, Indiana,

BUENA CHANEY,
33 South Sixth Street,
Terre Haute, Indiana,
Attorneys for All Appellants.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
I. Opinion Appealed From	1
II. Grounds on Which Jurisdiction of United States Supreme Court Is Invoked	2
III. The Following Questions Are Presented by This Appeal	3
IV. Concise Statement of Material Facts of Case	5
Appendix "A"	11
Opinion of the Court	11
Dissent Opinion	20
Appendix "B"	25

Authorities Cited.

Baker v. Carr (1962), 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. (2) 663 3

Reynolds v. Sims (1964), 377 U. S. 533, 567; 84 S. Ct. 1362; 12 L. Ed. 506 ..... 8, 9

Wesberry v. Sanders (1964), 376 U. S. 1, 8; 84 S. Ct. 526; 11 L. Ed. (2) 481 ..... 3, 8

28 U. S. C. Sections 1343 (3), 201 and 2284 2

IN THE

Supreme Court of the United States

No.

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants.

NELSON G. GRILLS,
Plaintiff and Appellee.

vs.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES E. NOLAND,
As Members of the Indiana State Election Board, Defendants and Appellees.

APPELLANTS' JURISDICTIONAL STATEMENT.

I. OPINION APPEALED FROM.

This is an appeal from the final judgment of a Three-Judge Panel Court entered in the United States District Court, Southern District of Indiana, Indianapolis Division on February 17, 1966, a copy of which opinion and dissenting opinion are marked Appendix "A" for identification, affixed to this Jurisdictional Statement, and made a part hereof by reference. The opinions are not reported as of this date.

II. GROUNDS ON WHICH JURISDICTION OF UNITED STATES SUPREME COURT IS INVOKED.

A. The Appellants contend that Chapter 205 of the Acts of 1965, passed by the 94th Indiana General Assembly re-apportioning the United States Congressional Districts of the State of Indiana violates their rights guaranteed them by Article 1, Section 2 of the Constitution of the United States in that said State statute does not apportion the population equally among the congressional districts as nearly as is practicable and that the population constituted in said Congressional districts varies so greatly that one man's vote in a congressional election is unconstitutionally weighted or lightened as compared with another man's vote in other Congressional Districts within the State of Indiana. Jurisdiction was found to exist by the lower Court and a Three-Judge Court was convened, all pursuant to 28 U. S. C. Sections 1343 (3), 2201, and 2284.

B. Judgment of the lower Court was rendered and entered on February 17, 1966. Appellants filed their Notice of Appeal on March 14, 1966, in the United States District Court, Southern District of Indiana, Indianapolis Division. Appellants filed Verified Application To Extend Time For Filing Record and Docketing Appeal in said District Court on April 27, 1966. The District Court through the Honorable S. Hugh Dillin, extended the time to July 22, 1966 within which to file the Record and Docket this Appeal. That the Filing of the Record and Docketing of this Appeal is timely and in conformance with the extension of time granted by the lower Court.

C. Appeal to the United States Supreme Court is taken pursuant to 28 U. S. C. 1253.

D. The following cases sustain the jurisdiction of the United States Supreme Court over this appeal:

Wesberry v. *Sanders* (1964), 376 U. S. 1, 8; 84 S. Ct. 526; 11 L. Ed. (2) 481.
Baker v. *Carr* (1962), 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. (2) 663.

E. The statute of the State of Indiana alleged to be Unconstitutional by this action and this appeal is Chapter 205 of the Acts of 1965, Page 469, passed by the 94th Indiana General Assembly, the verbatim text of which appears in Appendix "B," attached hereto and made a part hereof.

III. THE FOLLOWING QUESTIONS ARE PRESENTED BY THIS APPEAL.

1. Whether or not Chapter 205 of the 1965 Acts of the Indiana General Assembly reapportioning the eleven United States Congressional Districts in the State of Indiana violates Article 1, Section 2 of the United States Constitution.

2. Whether or not said statute of the State of Indiana reapportions the population into Congressional Districts that are as equal in population as is practicable, when the undisputed evidence was that historically the State had defined Congressional Districts by use of Township boundary lines, Town and City boundaries, City Ward boundaries, Streets and Rivers, and that had the State continued such method, the variation of population in the Congressional Districts could have been either equal or not in excess of 2% variation from being equal in population.

3. Whether or not the Act passed by the 94th Indiana General Assembly in 1965 realigning the eleven Congressional Districts in the State of Indiana in such manner that one district is under populated by 12.8% from the average-populated congressional district based on the 1960 U. S. Census and another district is over-populated by

7.2%, representing a 20% variation, totalling a population variance of 84,545 persons between the two districts, violates the principle of "one man, one vote" established as ruling precedent by the Supreme Court of the United States for Congressional District apportionment pursuant to Article 1, Section 2 of the United States Constitution.

4. Whether or not the Congressional Districts in the State of Indiana as realigned by Chapter 205 of the 1965 Acts of the Indiana General Assembly comply with Article 1, Section 2 of the United States Constitution requiring that the Congressional Districts be substantially equal in population so that the weight of a voter in one district is equal to the weight of any voter of another district. Said Indiana Congressional Districts are reapportioned by said 1965 Act as follows:

*District	Population U.S. Census 1960	Variance from Average	Percentage of Variance from Average
1	454,208	+30,345	+ 7.2
2	431,064	+ 7,201	+ 1.7
3	384,079	—39,784	— 9.7
4	450,937	+27,074	+ 6.4
5	426,110	+ 2,247	+ 0.5
6	538,961	+15,098	+ 3.6
7	369,663	—54,200	—12.8
8	443,252	+19,389	+ 4.6
9	424,933	+ 1.070	+ 0.3
10	406,218	—17,645	— 4.2
11	433,073	+ 9,210	+ 2.2
Total....	4,662,498		

*Average District: 423,863.

IV. CONCISE STATEMENT OF MATERIAL FACTS OF CASE.

Appellants were permitted to intervene in this action that was originally filed by Appellee, Nelson G. Grills attacking the constitutionality of the 1941 Act of the Indiana General Assembly apportioning the Congressional Districts before the 1965 Act. Appellants by their intervention sought injunctive relief against the members of the State Election Board and a declaration of the unconstitutionality of the 1965 Act of the Indiana General Assembly reapportioning the U. S. Congressional Districts in Indiana upon similar grounds as alleged by Appellee Grills with respect to the 1941 Act.

All parties to the action conceded and stipulated that Chapter 174 of the 1941 Acts of the Indiana General Assembly under which the Congressional Districts were constituted prior to the 1965 Act was and is in violation of Article 1, Section 2 of the United States Constitution. No error is predicated upon the lower Court so holding.

The evidence before the Court showed the following:

That the 1960 U. S. Census of the population of Indiana shows a total population of 4,662,498, and that, based on such 1960 census, the eleven Congressional Districts should be so divided that each would contain substantially 423,863 persons.

That the actual population of the eleven Congressional Districts vary from the figure of 423,863 as follows:

1st District	30,345	overpopulated by 7.2%
2nd District	7,201	overpopulated by 1.7%
3rd District	39,784	*under*populated by 9.4%
4th District	27,074	overpopulated by 6.4%
5th District	2,247	overpopulated by 0.5%
6th District	15,098	overpopulated by 3.6%

7th District	54,200	*under*populated by 12.8%
8th District	19,389	overpopulated by 4.6%
9th District	1,070	overpopulated by 0.3%
10th District	17,645	*under*populated by 4.2%
11th District	9,210	overpopulated by 2.2%

There are eight Districts that are overpopulated by a total of 111,633 persons and three Districts that are underpopulated by a total of 111,632 persons showing a total disparity of 223,265 persons; the 7th District has 84,545 fewer people in it than does the 1st District as shown by the 1960 Census and the 1st District has 84,545 more people in it than does the 7th District as shown by said Census.

The United States Census of 1960 shows the population of Indiana by counties, or by cities, towns, townships, and even plat areas within major urbanized areas.

Thus it was practical to use county, township, town or city boundary lines and rivers or other geographical or natural boundaries in defining the Congressional Districts to the end that each of the districts would have been substantially equal in population. This was not done.

The Evidence showed that town, city, township and ward boundary lines had been used in the past by the Indiana General Assembly in defining Congressional Districts.

In Indiana Acts 1931, Chapter 113, Section 14, Page 449, the Twelfth Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as Township lines.

In Indiana Acts 1935, Chapter 247, Section 1, Page 1256, the Eleventh Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as White River, incorporated towns of Woodruff Place and Beech Grove, Township and County boundary lines.

In Indiana Acts 1965, Chapter 205, the Act before this Court, the legislatiure used township boundary lines to define the 1st, 2nd, 6th, 10th and 11th Con-

gressional Districts, thus recognizing the fact that it is entirely proper to use township lines as boundaries of Congressional Districts rather than county lines.

The evidence showed that by using Township and Municilines as boundaries, the variances from the ideal Disct can be reduced to an average variance of approxitely 1%, in lieu of the present 12.8% in one District as ablished by the 1965 Indiana General Assembly. This s pointed out by the minority opinion of the Court:

> "The unquestioned facts before this Court are that Indiana and its legislature *could and should have* reapportioned Indiana by one of countless combinations by realigning of Counties in groupings and/or townships in groupings. Any one of such combinations would have been constitutional and in accord with the teachings of the Supreme Court." (Emphasis added.)

The failure of the 1965 General Assembly of the State Indiana to use available practicable means and methods reapportioning the Congressional Districts is the basic ue presented by this appeal. The *undisputed* evidence s that the 1965 General Assembly could have followed of many practicable methods of districting the State l dividing the population among the districts, any one which would have resulted in substantially more equal ing power of the voters within the districts than the roximate 20% variation between one District (the 7th trict) and another (the 1st District) established by 1965 Indiana Act.

he Mandate of the United States Supreme Court deciis and the United States Constitution is that Consional Districts shall be so drawn and the population ded among them that each person's vote for congresal electors is equal, as nearly as is practicable, to the of any other person in any other district in the State.

Wesberry v. *Sanders* (1965), 376 U. S. 1, 8; 84 S. Ct. 526; 11 L. Ed. (2) 481:

> "We hold that, construed in its historical context, the command of Article I, Section 2, the Representatives be chosen "by the people of the several states" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as anothers."

At Page 12, the Court concluded:

> "While it may not be possible to draw congressional districts with mathematical precision, *that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.* That is the high standard of justice and common sense which the Founders set for us." (Emphasis added.)

Reynolds v. *Sims* (1964), 377 U. S. 533, 567; 84 S. Ct. 1362; 12 L. Ed. (2) 506:

> "The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote . . . But the basic principle of representative government remains and must remain unchanged—the weight of a citizens vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

As was observed in *Reynolds* v. *Sims* (1964), 377 U. S. 533, at Page 578, (*supra*) Congressional districts must fit into tighter limits of tolerance than do State reapportionment plans:

> "Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in Congressional districting . . ."

In preserving the weight equality of each citizen's vote the State of Indiana could and should have used available

Township, City, and Town boundaries. As was observed in *Reynolds* v. *Sims* (*supra*), 377 U. S. 533, at page 575,

> "Political subdivisions of States—Counties, Cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of State governmental functions."

It is submitted that the District Court erred in failing to declare said 1965 Indiana Act unconstitutional and granting the injunctive relief prayed for by Appellants.

Appellants respectfully request that Oral Argument be granted.

Respectfully submitted,

DOROTHY C. DUDDLESTON,
JOHN P. GALLAGHER,
MILES H. MARSHALL,
LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants.

By Benjamin G. Cox
BENJAMIN G. COX
and
Buena Chaney
BUENA CHANEY,
Attorneys for Appellants.

BENJAMIN G. COX,
Attorney at Law,
701 Merchants National Bank Bldg.
Terre Haute, Indiana,
Telephone: Crawford 6005,
BUENA CHANEY,
Attorney at Law,
33 South Sixth Street,
Terre Haute, Indiana,
Telephone: Crawford 0108.

PROOF OF SERVICE.

I, BUENA CHANEY, attorney for DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, and LOUIS Y. MUNDY, Intervening Plaintiffs and Appellants herein, and being first duly sworn, upon my oath, depose and say that on the 18 day of July, 1966, I served copies of the foregoing Jurisdictional Statement on the several parties thereto as follows:

1. Defendants, Roger D. Branigin, Edwin M.S. Steers and James E. Noland, as members of the State Election Board of Indiana, by mailing a copy in a duly addressed envelope with firstclass postage prepaid to JOHN J. DILLON, Attorney General of the State of Indiana, who is the Attorney of Record for said named defendants at his office in the State House, Indianapolis, Indiana.

2. Nelson G. Grills, Plaintiffs pro se, by mailing a copy in a duly addressed envelope with first-class postage prepaid to his address of 1669 East Kessler Boulevard, Indianapolis, Indiana.

And further Affiant saith not.

Buena Chaney

BUENA CHANEY.

STATE OF INDIANA, } ss.:
COUNTY OF VIGO. }

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said County and State, this 18 day of July, 1966.

WITNESS my hand and seal.

Lael D. Hire

LAEL D. HIRE, *Notary Public.*

My Commission expires: May 22, 1967.

APPENDIX "A".

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

NELSON G. GRILLS,
Plaintiff,
DOROTHY C. DUDDLSTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs,
vs.
ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES E. NOLAND, As Members of the State Election Board of Indiana,
Defendants.

No. IP 64-C-101

OPINION OF THE COURT.

On March 2, 1964, the plaintiff, Nelson G. Grills filed his action against the persons then constituting the Indiana State Election Board, in their official capacity as such, seeking to enjoin them from conducting an election in the State of Indiana in 1964 or thereafter for representative in Congress from any of the eleven congressional districts of Indiana, as those districts were apportioned by Chapter 174 of the Acts of the General Assembly of 1941. He charged that the districts established by such Act do not apportion among the citizens of Indiana the members of the House of Representatives in accordance with Article 1,

Section 2 of the Constitution of the United States, that he and other citizens of Marion County, Indiana (comprising the Eleventh, and most overpopulated District) were thus deprived of various rights guaranteed to them by the fourteenth Amendment to such Constitution, and sought a declaratory judgment to this effect.

Jurisdiction of the action was found to exist, and a three judge court convened. 28 U.S.C. §§ 1343(3), 2284. However, the Court, having found, *inter alia,* that the political calendar dictated by the Indiana Election Code was already in operation for the 1964 general election when the action was commenced, and that there was no prospect of a session of the Indiana General Assembly until after such election, elected to abstain from proceeding with the cause until a reasonable time after commencement of the 94th Indiana General Assembly. The 94th General Assembly convened in due course and enacted a new districting act, Chapter 205 of the Acts of 1965, which realigned all eleven congressional districts and repealed all laws in conflict. It became effective March 9, 1965.

Thereafter, on January 10, 1966, Dorothy C. Duddleston, John P. Gallagher, Miles H. Marshall, and Louis Y. Mundy, respectively citizens of the newly constituted Seventh, First, Tenth, and Sixth Congressional Districts, were permitted to intervene as parties plaintiff for the purpose of seeking injunctive relief against the members of the State Election Board and a declaration of unconstitutionality as to the 1965 Act upon similar grounds as alleged by Grills with respect to the 1941 Act. Such intervening plaintiffs asserted as further grounds for relief that the 1965 Act established districts which were not compact, contingnous, equal and cohesive, disregarded natural or historical boundary lines, and gerrymandered the districts along political lines.

Roger D. Branigin was substituted for Matthew E. Welsh

as a party defendant, the former having in January, 1965 succeeded the latter as a member of the State Election Board, and the cause was summarily ordered put at issue and advanced on the trial calendar because of the public importance of the questions involved. Evidence was heard and concluded on January 31, 1966.

We first consider the separate complaints of the intervening plaintiffs other than those relating to the inequality of population as between the newly constituted districts. As to the allegation that the districts, or some of them, contain territory which is not contiguous to other territory within the district, we find as a fact that plaintiffs have failed to sustain their burden of proof with respect thereto. Other allegations are that the districts are not compact, not cohesive, disregard natural or historical boundary lines, and are politically gerrymandered to make them "safe" for candidates of one or another of the major political parties. None of these elements result in invidious discrimination, relative to any person's race, color, creed, national origin or sex, and do not state a federal question. *Wood* v. *Broom,* 287 U. S. 1, 6-7, 53 S. Ct. 1, 77 L. ed. 131 (1932); *Wesberry* v. *Sanders,* 376 U. S. 1, 7-8, 84 S. Ct. 526, 11 L. ed. 2d 481 (1964); *Lucas* v. *44th Gen. Assembly of the State of Colorado,* 377 U. S. 713, 738, 84 S. Ct. 1472, 12 L. ed. 2d 632 (1964); *WMCA, Inc.* v. *Lomenzo,* D. C., S. D. N. Y., 1965, 238 F. Supp. 916, 926, affd. 382 U. S. 4, 86 S. Ct. 24, 15 L. ed. 2d 2.

We finally arrive at the only justiciable issues raised by the original and intervening plaintiffs, which are whether either the 1941 Act or the 1965 Act, or both, are unconstitutional by reason of population variances between the congressional districts therein constituted The law, of course, is that Article 1, § 2 of the Constitution is to be interpreted as meaning that "as nearly as is practicable

one man's vote in a congressional election is to be worth as much as anothers." *Wesberry* v. *Sanders, supra.*

The difficulty lies in interpreting what is "as nearly as is practicable," for the Supreme Court has not only thus far declined to furnish a definitive yardstick but has observed that "it may not be possible to draw congressional districts with mathematical precision," *Wesberry.* And with regard to the similar problem of legislative apportionment it has warned against any "attempt to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population," adding: "In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards . . ." *Roman* v. *Sincock,* 377 U. S. 695, 710, 84 S. Ct. 1462, 12 L. ed. 2d 620 (1964). It has also said that "what is marginally permissible in one state may be unsatisfactory in another, depending on the particular circumstances of the case." *Reynolds* v. *Sims,* 377 U. S. 533, 578, 84 S. Ct. 1362, 12 L. ed. 2d 506 (1964).

We take judicial notice of the startling results seen in the 1960 decennial census report due to the explosion and shift of population.

For example, a district's population has more than doubled between 1950 and 1960. Such a district which may be an ideal district in population in contrast to other districts in a given state, at the time of the census, may create a condition before the first post-congressional election takes place whereby the voter in such district may have by far a smaller weighted vote than that enjoyed in another congressional district in the same state. Such an event would produce greater abnormal tolerances than exist in the case which we now have under consideration.

Then, too, where a congressional district has doubled in

population, a voter's weighted vote will be at least one-half that of a vote in other congressional districts in the same state. The only corrective method to keep that district comparatively even with the other districts in the state would be to take a new census every two years and promptly reapportion.

We find from the relevant statutes and the 1960 Federal census, of which we take judicial notice, that the populations of the eleven Indiana congressional districts as constituted both by the 1941 and the 1965 Acts are as set out in the table attached to and forming a part of this opinion, which table also shows deviations above and below the ideal population of a district (423,863) in terms both of percentage and of people.

From such table it will be noted that under the 1941 Act, the districts varied in population from 290,596 to 697,567; thus the ratio of the largest to the smallest district in terms of population was 2.4 to 1. The six smaller districts had a combined population of 2,095,302, out of the State's total population of 4,662,498, so that 44.9% of the population elected a majority of the congressional delegation of the State. Finally, the population fluctuations ranged from an underpopulation of 31.5% to an overpopulation of 64.6%, for a total variance from the least to the highest populated district of 96.1%. Six of the eleven districts varied from the ideal population figure by more than 15%.

The 1941 Act is clearly unconstitutional by all previously announced judicial standards, cf. *Wesberry* v. *Sanders, supra; Martin* v. *Bush,* 376 U. S. 222, 84 S. Ct. 709, 11 L. ed. 2d 656 (1964); *Moore* v. *Moore* (D. C. Ala., 1964), 229 F. Supp. 435; *Meeks* v. *Anderson* (D. C. Kan., 1964), 229 F. Supp. 271; *Maryland Citizens Committee* v. *Tawes,* (DC Md., 1964) 228 F. Supp. 956. It has been suggested that this issue became moot with the passage of the 1965 Act,

but we deem it advisable to specifically hold the 1941 Act to be unconstitutional, as we did at the outset of the trial (all parties being in agreement on the matter), in order to eliminate any possibility of its revival in the event of the 1965 Act being subsequently held to be invalid for any reason.

Under the 1965 Act we find that the extreme variations in population are from 369,663 to 454,208, a ratio of 1.2 to 1. The six smaller districts have a combined population of 2,442,067, so that a majority of the entire congressional delegation is now elected by a true majority of 52.5% of the total population. (Ideally the percentage would be 54.5%, the decimal equivalent of the fraction 6/11.) Individual district fluctuations are from an under population of 12.8% to an overpopulation of 7.2%, for a total variance from the least to the highest populated district of exactly 20.0%. None of the districts varies from the ideal population figure by as much as 15%, and only one by more than 10%.

Although, as above noted, the Supreme Court has thus far refused to countenance evaluation of constitutionality in terms of mathematical absolutes, it is inevitable that such standards have been seriously proposed by members of the judiciary and of the Congress, political scientists, and others. Such opinions, while not binding upon us, are at least entitled to be noted. One view, in existence long before *Wesberry*, was that no district should contain fewer than 85% of the population average nor more than 115%.[1] This formula is contained in a bill presently pending before the Congress.[2] Another widely discussed view is that the sum of the highest and lowest variations from average population, expressed as a percent, should not exceed 20%. Still another is to consider the ratio of variance between the districts having the highest and lowest populations. A ratio of 1.5 was disapproved in *Roman* v. *Sin-*

cock, supra, but ratios of 1.3, existing in Massachusetts, Minnesota, Iowa, and New York, have not been challenged.[3] Colorado's 1964 revision, resulting in a ratio of 1.2, has likewise not been challenged.[4] The New Hampshire districts have been reapportioned, and the resulting ratio of 1.2 upheld by the State Supreme Court. *Levitt* v. *Maynard* (1964), 105 N. H. 447, 202 A. 2d 478.

It will be observed that the redistricting of the Indiana congressional districts, as contained in Chapter 205 of the Acts of 1965 meets various suggested tests in that: the ratio between the largest and smallest districts is 1.2, no district varies from average by as much as 15%, the total variation between the largest and smallest district does not exceed 20%, and it requires a majority of the total population to elect a majority of the Indiana delegation to the House of Representatives in Congress. No matter what reapportionment bill may be passed, it is safe to say that there is always room for improvement. The trend must be towards the ideal proportions.

We have considered the action of the 94th General Assembly of Indiana in enacting the 1965 Act in the light of the fact that more definite guide lines have not been provided by either the Courts or Congress, and the further fact that there are only four districts varying more than 6% from the ideal, as follows:

---

1. "The Reapportionment of Congress," 45 American Political Science Review 153 (1951).

2. H. B. 5505, introduced by Representative Celler, contains the 15% formula; it passed the House of Representatives at the first session of the 89th Congress, and now awaits action by the Senate.

3. "Congressional Districting and the Wesberry Case," The Library of Congress Reference Service (1965).

4. *Id.*

District	% Variation
1	+ 7.2
4	+ 6.4
7	—12.8
3	— 9.7

We find the Act constitutional, within the provisions of Article 1, § 2 of the Constitution, as interpreted by *Wesberry* v. *Sanders, supra.*

In so holding we are not unmindful of the likelihood of further judicial direction and improvements by way of subsequent legislative enactments. It is strongly suggested that the members of the 95th General Assembly of Indiana, which will be created by elections under the 1965 legislative apportionment Act, take action to eliminate any abnormalities in the 1965 congressional reapportionment Act in order that Indiana may have not merely a legal Act but a model Act. Such action of the General Assembly, of course, should take into consideration any new guide lines laid down by decisions of the courts or by congressional enactment.

Dated this 17th day of February, 1966.

WIN G. KNOCH,
Win G. Knoch, Judge, U. S. Circuit of Appeals for the Seventh Circuit, Designated Member of the Three-Judge Trial Court.

S. HUGH DILLIN,
S. Hugh Dillin, Judge, U. S. District Court, Assigned Trial Judge, and Member of the Three-Judge Trial Court.

TABLE OF INDIANA CONGRESSIONAL DISTRICTS.

	Population	Variance in Population	Variance in percentage of Population
District	1965 Act	1965 Act	1965 Act
1	454,208	+30,345	+ 7.2
2	431,064	+ 7,201	+ 1.7
3	384,079	—39,784	— 9.7
4	450,937	+27,074	+ 6.4
5	426,110	+ 2,247	+ 0.5
6	438,961	+15,098	+ 3.6
7	369,663	—54,200	—12.8
8	443,252	+19,389	+ 4.6
9	424,933	+ 1,070	+ 0.3
10	406,218	—17,645	— 4.2
11	433,073	+ 9,210	+ 2.2
	4,662,498		

Average District: 423,863

UNITED STATES DISTRICT COURT.

Southern District of Indiana,

Indianapolis Division.

NELSON G. GRILLS,
Plaintiff,

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs,

vs.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES E. NOLAND, As Members of the State Election Board of Indiana,
Defendants.

} No. IP 64-C-101

DISSENT OPINION.

The action was commenced March 2, 1964. Mr. Grills' action contested the congressional apportionment in Indiana as created by Chapter 174 of the 1941 Acts of the Indiana General Assembly. The Supreme Court had just spoken in the congressional districting case of *Wesberry et al.* v. *Carl E. Sanders,* 376 U. S. 1, which had been decided February 17, 1964. It was decided:

> "**** that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives."

This Court abstained from action in 1964 for the many reasons listed in an abstention order. Chief among them was the avoidance of political disorder in the conduct of the congressional elections. The election calendar was already in motion with candidates already announced and no legislature was then in session. We further stated in that order that the Court had confidence that the Indiana General Assembly of 1965 would heed the new judically stated principles governing congressional districting of a state by the constituted legislature of Indiana.

Thereafter, the Supreme Court spoke again on June 15, 1964 in the case of *Reynolds* v. *Sims*, 377 U. S. 533, following *Wesberry* v. *Sanders*, and I quote therefrom as follows:

> "In that case (referring to *Wesberry* v. *Sanders*) we decided that an apportionment of congressional seats which
>
> > 'contracts the value of some votes and expands that of others'
>
> is unconstitutional, * * *."

The 1965 Legislature has met and by Chapter 205 created new congressional districts which do not follow the teachings of these Supreme Court Opinions. The majority of the states have substantially complied with the law and those who have not are for the most part now engaged in legal actions or legislative corrective action is under way.

It is unfortunate that the motives in redistricting creep into the issues on both sides of litigation and becloud the issues. If the legislature would but follow the teachings of the judicial interpretation of these cases the motives for the passing or opposing of the legislation by the majority and minority parties may be tolerated.

The facts are that the 1960 census places the population of Indiana at 4,622,498 which makes the perfect district for the allotted eleven for Indiana at 423,863 inhabitants.

The districts created had the following population contractions and expansions from such perfect constitutional district:

	Contraction	Expansion
1st District		30,345
2nd District		7,301
3rd District	39,784	
4th District		27,074
5th District		2,247
6th District		15,098
7th District	54,200	
8th District		19,389
9th District		1,075
10th District	17,645	
11th District		9,210

Examination of these districts when compared with the rule of "one vote-one man" and a substantial compliance therewith leaves no other rational conclusion but that a substantial number of the inhabitants of Indiana are paying with usurious votes in the selection of their congressmen and another substantial number are obtaining more voting power with their vote.

It may be judicially noticed that the seventh district was in a greater state of imbalance when the 1965 districting Act was passed over the 1960 census. Stating it another way the legislation was based on the 1960 census and the majority opinion and dissent opinion are also so based on 1960 population records.

It is gerrymandering. It is unnecessary to examine the gerrymandering motives of the minority and majority parties and influential factions in both very deeply. One sees that two minority congressmen are placed in completely new districts with only their home county retained from the old district in which the people had repetatively chosen them as their congressmen. In one instance a narrow strip of land was used to provide contiguous geography and

circumvention of the Indianapolis water reservoir which provided a natural barrier.

It is further evidenced by the casting of one minority congressman against another and thus reducing the minority delagation to Congress by one more without the voters' choice being exercised in enriching the majority by another. Gerrymandering is referred to in this opinion only to show the effect and thus point up the unconstitutional districting which my colleagues of the bench have countenanced. The gerrymander was at the expense of upholding the mandate of the Supreme Court.

The correction of the outsized and undersized districts to constitutional sized districts will of neeessity change some of the other districts and will prevent unlawful gerrymandering and still permit room for lawful "politicing". If the Courts permit this then we do not have elections governed by fair rules and we unleash the forces of retaliation in political organizations of the kind we should abhor in organized society. The Attorney General of Indiana would have us return to the rule of the "political thicket". This trial court must follow the rule of law established by the Supreme Court.

'The unquestioned facts before this Court are that Indiana and its legislature could and should have reapportioned Indiana by one of the countless combinations by realigning of counties in groupings and/or townships in groupings. Any one of such combinations would have been constitutional and in accord with the teachings of the Supreme Court. Indiana then would be in the class of the majority of the states of the United States instead of resisting the clear mandate of the United States Constitution. The voters of the seventh district with 54,200 votes (based on the 1960 census) enjoy the privileges of a small district to the detriment of others. In order to keep it small and why it was so gerrymandered, the counties around its

perimeter must be examined to ascertain why they were not annexed. What would have been the districting if they were removed from the surrounding districts? Thus, gerrymandering was extended to those districts. There is a place for gerrymandering but not at the expense of the rule of law governing the right of the inhabitants to equal voting power. The majority of this Court strongly recommends that the 1967 Session of the Indiana Legislature eliminate the abnormalities whereas it should be done now before the 1966 Congressional Election. Indiana should commence and maintain the ten year cycle of the Federal census and the many valid long enduring benefits to the established districts' peoples. The awaiting of a new legislature only compounds the unsettled state of Indiana's districts and permits another malapportioned Indiana Congressional Election in 1966.

I would find that the plaintiff and intervening plaintiffs had maintained their burden of proof of this action and declare Chapter 205 of the 1965 Acts of the Indiana General Assembly unconstitutional.

Dated this 17 day of February, 1966.

Cale J. Holder,
Cale J. Holder, Judge, United States District Court Southern District of Indiana, and Designated Member of the Three-Judge Trial Court.

APPENDIX "B".

CHAPTER 205.

[H. 1041. Approved March 9, 1965.]

AN ACT dividing the State of Indiana into congressional districts designating the territory constituting each district, and repealing all laws and parts of laws in conflict therewith.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. That the State of Indiana be and the same is hereby divided into eleven districts for the election of representatives in Congress, and each of said districts shall be entitled to elect one representative in Congress at the general election to be held in said state on the first Tuesday after the first Monday in November, 1966 and at each general election thereafter.

SEC. 2. The limits of each district and the territory included therein shall be as hereinafter provided in Sections 3 to 13 of this Act.

SEC. 3. The townships of Calumet, North and Hobart in the County of Lake as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the First Congressional District of the State of Indiana.

SEC. 4. The townships of St. John, Ross, Hanover, Center, Winfield, West Creek, Cedar Creek and Eagle Creek in the County of Lake as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 and the Counties of

Porter, Wabash, Newton, Jasper, Penton, Pulaski, White, Tippecanoe, Caroll, Cass, Fulton and Kosciusko shall be and constitute the Second Congressional District of the State of Indiana.

SEC. 5. The Counties of LaPorte, St. Joseph, Starke and Marshall shall be and constitute the Third Congressional District of the State of Indiana.

SEC. 6. The Counties of Elkhart, LaGrange, Noble, Steuben, Allen, Whitley, and Dekalb shall be and constitute the Fourth Congressional District of the State of Indiana.

SEC. 7. The Counties of Huntington, Wells, Adams, Howard, Grant, Blackford, Jay, Miami and Madison shall be and constitute the Fifth Congressional District of the State of Indiana.

SEC. 8. The townships of Pike, Washington, Decatur, Perry, Franklin and Warren, in the County of Marion, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965, and the Counties of Clinton, Boone, Hendricks, Johnson, Montgomery and Morgan shall be and constitute the Sixth Congressional District of the State of Indiana.

SEC. 9. The Counties of Fountain, Warren, Parke, Vermillion, Putnam, Vigo, Clay, Owen, Sullivan, Greene, Monroe, Daviess and Brown shall be and constitute the Seventh Congressional District of the State of Indiana.

SEC. 10. The Counties of Posey, Gibson, Vanderburgh, Pike, Warrick, Dubois, Spencer, Crawford, Perry, Harrison, Knox, Martin and Floyd shall be and constitute the Eighth Congressional District of the State of Indiana.

SEC. 11. The Counties of Lawrence, Orange, Bartholomew, Decatur, Franklin, Jackson, Jennings, Ripley, Dearborn, Ohio, Switzerland, Jefferson, Scott, Clark, Shelby, Fayette and Washington shall be and constitute the Ninth Congressional District of the State of Indiana.

SEC. 12. The township of Lawrence in the County of Marion as that township existed and its respective geographical boundaries were established and fixed on January 1, 1965 and the counties of Delaware, Randolph, Henry, Hancock, Wayne, Rush, Hamilton, Tipton and Union shall be and constitute the Tenth Congressional District of the State of Indiana.

SEC. 13. The townships of Wayne and Center in the County of Marion as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the Eleventh Congressional District of the State of Indiana.

SEC. 14. Any and all laws in conflict with this Act are hereby repealed.

SEC. 15. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
AUG 18 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 370

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants,

NELSON G. GRILLS,
Plaintiff and Appellee,

v.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES E. NOLAND,
As Members of the Indiana State Election Board, Defendants and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO AFFIRM

JOHN J. DILLON
Attorney General of Indiana
219 State House
Indianapolis, Indiana
Attorney for Appellee Election Board

C. E. Pauley & Co., Inc., Indianapolis

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants,

NELSON G. GRILLS,
Plaintiff and Appellee,

v.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES E. NOLAND,
As Members of the Indiana State Election Board, Defendants and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO AFFIRM

MOTION TO AFFIRM

Appellees move the Court to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I. THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

Appellants present one and only one question for the consideration of this Court: Is the population difference between Congressional Districts in the State of Indiana, as those populations are determined by the 1960 United States census and those Districts are established by Chapter 205 of the 1965 Acts of the General Assembly of Indiana, so substantial as to violate the "one person-one vote" principle of Article 1, Section 2 of the United States Constitution?

Unfortunately but understandably, appellants do not argue that question but instead contend that it would be possible to establish districts with a lesser population difference. Their argument on this issue is based on two points:

1. The State of Indiana has frequently bounded Congressional Districts with township, town, and city borders as well as county lines;

2. If township, town, and city borders were used as boundaries to a greater extent in the 1965 Indiana Districting Act the population difference between districts could be held to less than 1%.

Appellees do not disagree with either point; they simply fail to see the relevance of either point.

Whether the State of Indiana has used township or other political subdivision boundaries to delineate Congressional Districts is of no importance. If the use of such boundaries should be necessary to establish equally populated districts, then such boundaries must be used no matter what the historical precedent.

Similarly, there can be no disagreement over the proposition that using smaller population units as the basis for forming Congressional Districts would result in more numerically equal District populations. If the population units being combined into Districts are sufficiently small and a sufficient number of persons are given a sufficient amount of time to try various combinations of those units, then it would be possible to formulate Congressional Districts of perfect numerical equality as determined by a given decennial census. With sufficient good fortune such districts might even be formulated prior to the taking of the following decennial census. Fortunately, such scrupulous precision is not necessary. In *Reynolds v. Sims* (1964), 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, the United States Supreme Court, in discussing the apportioning of State legislators, said, at page 577 of 377 U.S.:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.[57]
>
> "In Wesberry v. Sanders, supra, the Court stated that congressional representation must be based on population as nearly as is practicable.

"57 As stated by the Court in Bain Peanut Co. vs. Pinson, 282 U.S. 499, 501, 51 S. Ct. 228, 229, 75 L. Ed. 482, 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

The question then is not whether it would be possible for the Indiana General Assembly to establish districts more nearly equal in population, but whether the districts now established do satisfy the constitutional requirement of substantially equal population. If that requirement is satisfied, then appellant's complaint is reduced to the Orwellian statement that a number of approaches are constitutional but some are more constitutional than others.

That one question has already been decided adversely to appellants by a three-judge Federal court. It is from that decision appellants are now appealing; it is that decision which should be affirmed. Appellants fail to show, to use the language of Supreme Court Rule 15 1(f), "reasons why the questions are presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." The jurisdictional statement filed by appellants does show that the Indiana General Assembly has established Congressional Districts that, while not mathematically precise, are based on population as nearly as practicable.

The extent to which the districts are based on population as nearly as practicable is best described by the opinion of the lower court, as presented on page 16 of the jurisdictional statement:

> "Although, as above noted, the Supreme Court has thus far refused to countenance evaluation of constitutionality in terms of mathematical absolutes, it is inevitable that such standards have been seriously proposed by members of the judiciary and of the Congress, political scientists, and others. Such opinions, while not binding upon us, are at least entitled to be noted. One view, in existence long before *Wesberry,* was that no district should con-

tain fewer than 85% of the population average nor more than 115%[1] This formula is contained in a bill presently pending before the Congress.[2] Another widely discussed view is that the sum of the highest and lowest variations from average population, expressed as a percent, should not exceed 20%. Still another is to consider the ratio of variance between the districts having the highest and lowest populations. A ratio of 1.5 was disapproved in *Roman v. Sincock, supra,* but ratios of 1.3, existing in Massachusetts, Minnesota, Iowa, and New York, have not been challenged.[3] Colorado's 1964 revision, resulting in a ratio of 1.2, has likewise not been challenged.[4] The New Hampshire districts have been reapportioned, and the resulting ratio of 1.2 upheld by the State Supreme Court. *Levitt v. Maynard* (1964), 105 N.H. 447, 202 A.2d 478.

"It will be observed that the redistricting of the Indiana congressional districts, as contained in Chapter 205 of the Acts of 1965 meets various suggested tests in that: the ratio between the largest and smallest districts is 1.2, no district varies from average by as much as 15%, the total variation between the largest and smallest district does not exceed 20%, and it requires a majority of the total population to elect a majority of the Indiana delegation to the House of Representatives in Congress. No matter what reapportionment bill may be passed, it is safe to say that there is always room for improvement. The trend must be towards the ideal proportions.

"1 'The Reapportionment of Congress,' 45 American Political Science Review 153 (1951).

"2 H.B. 5505, introduced by Representative Celler, contains the 15% formula; it passed the House of Representatives at the first session of the 89th Congress, and now awaits action by the Senate.

"3 'Congressional Districting and the Wesberry Case,' The Library of Congress Reference Service (1965).

"4 *Id.*"

An examination of the population relationships between the Congressional Districts established by Chapter 205 of the Indiana Acts of 1965 reveals how accurate the lower court's description is.

District	Population U. S. Census 1960	Variance from Average Numerical	Variance from Average Percentage	Weight of Single Vote Compared to Average
Average	423,863	.....	.....	1
1	454,208	+30,345	+7.2	.933
2	431,064	+ 7,201	+1.7	.983
3	384,079	—39,784	—9.7	1.104
4	450,937	+27,074	+6.4	.939
5	426,110	+ 2,247	+0.5	.995
6	438,961	+15,098	+3.6	.966
7	369,663	—54,200	—12.8	1.147
8	443,252	+19,389	+4.6	.956
9	424,933	+ 1,070	+0.3	.997
10	406,218	—17,645	—4.2	1.043
11	433,073	+ 9,210	+2.2	.979

There are only four districts where the value of a given voter's vote is as much as 5% different from the value his vote would have if all districts were perfectly equal. Such a minor variation is not a violation of the "one person-one vote" principle but is instead the necessary play in the joints of the machinery of government.

A county is not, and never was, an independent sovereign whose boundaries must remain inviolate. A county, when necessary, may be so divided that portions of it are contained in different Congressional Districts. Nevertheless, the county is a unit whose existence must be considered. The state's machinery for conduct of elections is based

on that unit. The organization of the political parties sponsoring candidates in an election is based on that unit. The voters in an election consider themselves members of that unit. Any practicable scheme of Congressional Districting must be based on that unit, especially when, as in the instant situation, a scheme based on that unit produces districts that are substantially equal. The use of smaller population units might produce districts more mathematically equal, but it would simultaneously produce chaotic elections and confused voters.

Furthermore, the use of counties as a population unit produces a manageable number of units to consider. Any apportionment plan must be devised on a trial and error basis. The population to be approximated in each district and the population of each unit is known. The trick is to combine the units, which must, for practical purposes, also be contiguous, into those districts. This can be done only by experimenting with various combinations. Increasing the number of population units would increase the number of possible combinations. Increasing the number of possible combinations would increase the amount of time necessary to devise districts. Unfortunately, there is nothing to increase the amount of time a state legislature may devote to such experiments. Using cities, townships, and towns as population units might, at the cost of properly regulated elections and election campaigns, produce districts more mathematically equal in number. It is much more apt to fail to produce any reapportionment.

The General Assembly of Indiana has established Congressional Districts that, except for the two counties whose population greatly exceeds the population of the ideal district, are bounded by county lines. In only four of the

eleven districts so established does the weight of a single voter's vote vary from the ideal weight by as much as five per cent; in none does it vary as much as fifteen per cent. In short, the General Assembly of Indiana has established Congressional Districts that are as nearly of equal population as is practicable.

II. CONCLUSION

WHEREFORE, Appellees submit that no substantial question is presented by this appeal and that the decision of the three-judge Federal Court should be affirmed in all things without plenary consideration.

Respectfully submitted,

JOHN J. DILLON
Attorney General of Indiana
219 State House
Indianapolis, Indiana

Office-Supreme Court, U.S.
FILED
SEP 2 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 370

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants,

NELSON G. GRILLS,
Plaintiff and Appellee,

vs.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES NOLAND, As Members of the Indiana State Election Board,
Defendants and Appellees.

APPELLANTS' OPPOSITION BRIEF TO APPELLEES' MOTION TO AFFIRM.

BENJAMIN G. COX,
Attorney at Law,
701 Merchants National Bank Bldg.,
Terre Haute, Indiana,

BUENA CHANEY,
Attorney at Law,
33 South Sixth Street,
Terre Haute, Indiana,
Attorneys for all Appellants.

THE CONTROLLER-WARREN PRINTING COMPANY, CHICAGO

INDEX.

AUTHORITIES CITED.

	PAGE
Wesberry v. Sanders (1964), 376 U. S. 1; 84 S. Ct. 526; 11 L. Ed. (2) 481	1, 6
Preisler, et al. v. The Secretary of State of Missouri (August 5, 1966), Mo. #1064 U. S. Dist. Ct. for Western Dist. of Missouri (unreported)	3, 4
Bush v. Martin, S. D. Tex. 1963, 224 F. Supp. 499	5
Gray v. Sanders (1963), 372 U. S. 368	6
Scholle v. Hare (1962), 369 U. S. 429	6
Wright v. Rockefeller (1964), 376 U. S. 52	7
Ex Parte Yarbrough (1884), 110 U. S. 651	8
U. S. v. Classic (1941), 313 U. S. 299	8
Colegrove v. Green (1946), 328 U. S. 549	9
Baker v. Carr (1962), 369 U. S. 186	10
Calkins v. Hare, E. D., Mich. (1964), 228 F. Supp. 824	10
Meeks v. Anderson, D. Kans. (1964), 229 F. Supp. 271	10
Drum v. Seawell, M. D., N. Car. (1965), 249 F. Supp. 877	12
Drum v. Seawell (1966), 383 U. S. 831	12
Maryland Citizens Committee for Fair Cong. Redist. Inc. v. Tawes, D. Md. (1964), 226 F. Supp. 80	12
Alton v. Tawes (1966), (U. S. Sup. Ct.), #1344 Oct. Term 1965, 34 Law Week 3406	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 370.

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants,

NELSON G. GRILLS,
Plaintiff and Appellee,

vs.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES NOLAND, As Members of the Indiana State Election Board,
Defendants and Appellees.

APPELLANTS' OPPOSITION BRIEF TO APPELLEES' MOTION TO AFFIRM.

Appellees' Motion to Affirm and their Brief in support thereof not only fails to substantiate an affirmance of the lower Court's decision, but actually supports Appellants' contention that the lower Court's decision is contrary to the guideline established by the United States Supreme Court in *Wesberry* v. *Sanders*—376 US 1, 84 S. Ct. 526, 11 L. Ed. 2nd 481 (1964).

On Page 2 of their Motion to Affirm and Brief in support thereof, the Appellees state that they "do not disagree" with the point that:

> "If township, town and city borders were used as boundaries to a greater extent in the 1965 Indiana Districting Act the population difference between districts could be held to less than 1%."

On Page 2, they also state:

> "If the use of such boundaries should be necessary to establish equally populated districts, then such boundaries must be used no matter what the historical precedent."

On Page 3, they state:

> "... there can be no disagreement over the proposition that using smaller population units as the basis for forming Congressional Districts would result in more numerically equal District populations."

On Page 6, they state:

> "A county is not, and never was, an independent sovereign whose boundaries must remain inviolate. A county, when necessary, may be so divided that portions of it are contained in different Congressional Districts."

After all of these admissions, the Appellees assert on Page 8:

> "In short, the General Assembly of Indiana has established Congressional Districts that are as nearly of equal population as is practical":

The Appellees on Page 4 rely on the Orwellian proposition that there are degrees of constitutionality. Some acts are more constitutional than others.

On Page 6, they attempt to minimize the population disparity by reducing the weight of a "single vote compared

to the average'' and measure such weight in the thousandth degree of a percentage point.

On Pages 6 and 7, the Appellees assert that ''Counties'' must be considered in Congressional reapportionment, along with ''organization of political parties sponsoring candidates,'' and ''elections.'' They state that another factor to be considered (see Page 7) is that of determining districts containing a ''manageable number of units.'' They state that, ''The trick is to combine the units . . . into . . . districts.''

The Appellees then complain of the time consumed in performing this ''trick'' and state:

> ''Unfortunately, there is nothing to *increase the amount of time* a state legislature may devote to such experiments. Using cities, townships, and towns as population units might . . . produce districts more mathematically equal in number. It is much more apt to fail to produce any reapportionment.'' (Emphasis added.)

It is respectfully submitted that Congressmen represent people and not counties.

On August 5th, 1966, a three-Judge Panel Court in the United States District Court for the Western District of Missouri, Central Division, in a cause entitled *Paul W. Preisler,* et al v. *The Secretary of the State of Missouri,* et al, Cause #1064, rendered a decision holding unconstitutional the 1965 Congressional Reapportionment Act of the State of Missouri. The opinion has not been reported as of this date.

The facts and issues of *Preisler* et al v. *The Secretary of the State of Missouri,* supra are almost identical to the facts and issues involved in this Indiana case being appealed to the United States Supreme Court. The average population of the congressional districts in Missouri is

431,981, while in Indiana it is 423,863. The widest variation between districts in Missouri totalled 84,655, while the widest variation in Indiana totalled 84,545—a difference of 110 population.

The Missouri Federal District Court reached a decision diametrically opposed to the Indiana Federal District Court's opinion herein. The Missouri Federal Court commented on this as follows:

> "Again for the sake of clarity, we state our express disagreement with the rationale of *Moore* v. *Moore*, S. D. Ala. 1965, 246 F. Supp. 578, 18 and *Grills* v. *Branigin*, S. D. Ind. No. IP-64-C-101, decided February 18, 1966, but not yet reported.
>
> The factual situation in *Grills*, involving the 1965 Indiana Act, is comparable. The maximum variance between Missouri's smallest and largest districts exceeded that approved by the Indiana three-Judge Court in that case by only 110 population. Population variances of 84,655 and 84,545, respectively, involving a difference of only 110 population, calls for an application of the *de minimus* doctrine in quite a different way than we believe it should be applied in a congressional districting case. Such variances involve approximately a third of the total votes necessary to elect or defeat a single Congressman. Contrary to the majority opinion in *Grills* v. *Branigin*, we do not believe that the statement of such obvious over-weighting of the votes of population is made any smaller by stating the facts in terms of percentage figures. We reiterate our disagreement with the majority's opinion in *Grills* v. *Branigin* and state that we are in general agreement with the strong dissenting opinion of District Judge Cale J. Holder."

The scholarly decision rendered by the Missouri Federal *District Court* in *Preisler et al* v. *The Secretary of the State of Missouri*, supra is an excellent analysis of the law applicable to this Indiana Federal District Court case

herein appealed. The following excerpt from said opinion is adopted by Appellants as a part of this brief:

> "The constitutional standard against which Missouri's (Indiana's) 1965 Congressional Redistricting Act must be measured was definitively established by *Wesberry* v. *Sanders*. The Supreme Court there stated: 'We hold that, construed in its historical context, the command of Art. I, § 2 . . . means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.' (l.c. 7-8 of 376 U. S.). The Supreme Court repeatedly emphasized that population was to be the sole factor to be considered in Congressional reapportionment cases. On pages 8 and 9 of 376 U. S. it held that 'the history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.' And on page 13 of 376 U. S. it was stated that 'the debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.' Again, on page 14 of 376 U. S., it was stated:
>
> > It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater value in choosing a Congressman than others.
>
> "*In Bush* v. *Martin*, S. D. Tex. 1963, 224 F. Supp. 499, decided before *Wesberry* v. *Sanders*, Judge R. Brown contrasted 'the problem (of congressional redistricting) with that of the composition of State Leg-

islatures' (224 F. Supp. at 511). Reasoning from *Gray* v. *Sanders,* 372 U. S. 368 (1963), and *Scholle* v. *Hare,* 369 U. S. 429 (1962), Judge Brown suggested that 'the present indications are that considerable leeway must be allowed the States in the diffusion of its political initiative' (224 F. Supp. at 511). As to the different question of congressional representation, and with specific reliance upon Art. I, § 2 and the history of the Great Compromise as set forth in Warren, The Making of the Constitution, 141, 159, 163, 220-312 (1927), and Padover, To Secure These Blessings, 152-88, 285-301 (1962), Judge Brown, in anticipation of what was later held in *Wesberry* v. *Sanders,* stated at 511:

> But here we deal with a legislative assembly which, by the Constitution and because of the Great Compromise giving rise to that Constitution, is to bear a direct relation to population, and, at least as between the States, population only. . . . The simple constitutional fact is that so far as (a) the standard of composition of the Congress is concerned, as distinguished perhaps from (b) the standard governing the time and circumstance permitting or requiring judicial intervention, Members of Congress are to be elected on the basis of population and nothing else.

"The validity of Judge Brown's definitive holding that the standard of congressional districting was population alone was sharply contested by Judge James L. Noel, Jr. in his dissenting opinion. See page 519 of 224 F. Supp. Judge Noel there italicized that portion of Judge Brown's opinion that stated *'Members of Congress are to be elected on the basis of population and nothing else'* in order that precise attention be focused upon the point of judicial disagreement.

"Judge Brown was affirmed and Judge Noel's dissent was rejected by the Supreme Court's affirmance of *Martin* v. *Bush,* on March 2, 1964 by per curiam

opinion reported in 376 U. S. 233, on the authority of *Wesberry* v. *Sanders,* which had been decided two weeks earlier on February 17, 1964.

"On the same day that *Wesberry* v. *Sanders* was decided, the Supreme Court also decided *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), where an attack was made on the congressional districting of the State of New York under the Equal Protection Clause of the fourteenth Amendment. Mr. Justice Black, also the author of *Wesberry* v. *Sanders,* affirmed the district court's finding that the Equal Protection Clause had not been violated, and, noting the same basic distinction that Judge Brown had noted in *Bush* v. *Martin,* further stated:

> We do not pass on the question . . . not presented here, that is, whether the state apportionment is constitutionally invalid because it may fail in its objective to create districts based as nearly as practicable on equal population. See *Wesberry* v. *Sanders, ante,* p. 1. Since no such challenge has been urged here, the issues have not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing *on that wholly separate question.* 376 U. S. at 58. (Emphasis ours.)

"That the question presented by an attack under Art. I, § 2 is a 'wholly separate question' from that presented by an attack under the Equal Protection Clause of the fourteenth amendment was also emphasized in *Wesberry* v. *Sanders* itself. In footnote 10 on page 8 of 376 U. S., Mr. Justice Black held that because *Wesberry* v. *Sanders* was decided under Art. I, § 2, 'we do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.'

"We do not share the surprise some commentators have noted that the Supreme Court applied Art. I, § 2 to congressional redistricting instead of considering the Equal Protection Clause of the fourteenth amend-

ment as the only clause under which the validity of a congressional redistricting plan could be tested.

"Almost a hundred years ago, in times more politically troubled than our own, the Supreme Court laid the foundation upon which *Wesberry* v. *Sanders* is based. In *Ex Parte Yarbrough*, 110 U. S. 651 (1884), Mr. Justice Miller, speaking for a unanimous court, answered the argument that 'the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively', 110 U. S. at 662-663. That case held that 'it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States' (110 U. S. at 663). Article I, Section 2 was specifically identified as the controlling provision of the Constitution and, after quoting that section, the Supreme Court explained that 'the States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress . . . They define who are to vote for the popular branch of their own legislature and the Constitution of the United States says the same persons shall vote for members of Congress in that State' (110 U. S. at 663). 'It is not true,' Mr. Justice Miller held in conclusion, 'that electors for members of Congress owe their right to vote to the State law. . . .' (110 U. S. at 663.)

"Mr. Justice Stone added over a quarter of a century ago in *United States* v. *Classic*, 313 U. S. 299 (1941) at 314, that 'Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states'. He noted on page 315 that 'while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the sense that the states are authorized by the Constitution to legislate on the subject as provided by § 2 of Art. I, . . .'. *Ex Parte Yarbrough* was among the cases cited and relied upon.

"Most important for our present discussion, Mr. Justice Stone emphasized in *Classic* that the protection of a citizen's right to vote in a federal election was entirely separate from the protection of his right to vote in a State election. The separate rights are protected by entirely different constitutional provisions. 'Since the constitutional command (of Art. I, § 2) is without restriction or limitation,' Mr. Justice Stone held, 'the right, *unlike those guaranteed by the Fourteenth and Fifteenth Amendments,* is secured against the action of individuals as well as of states' (313 U. S. at 315, emphasis ours.)

"Plaintiffs in this case seek to protect their rights as conferred by Art. I, § 2 to vote in a federal election. The question of whether those rights have in fact been abridged must be adjudicated under the cases applicable to that question and not under Equal Protection Clause rules applicable to abridgments of their wholly separate right to vote in State elections, which are, to use the words of *Classic* in 1941, 'unlike those guaranteed' by Art. I, § 2, or to use the more recent words of *Wright* v. *Rockefeller, supra,* which present a 'wholly separate question.' (376 U. S. at 58.)

"Both *Ex Parte Yarbrough* and *Classic* were cited and relied upon by Mr. Justice Black both in his dissent in *Colegrove* v. *Green,* 328 U. S. 549 at 570 (1946), and in his opinion in *Wesberry* v. *Sanders,* 376 U. S. at 17 (1964). In his *Colegrove* dissent he stated that 'Article I provides that Congressmen "shall be . . . chosen . . . by People of the several States" ', and, specifically in reliance upon *Ex Parte Yarbrough,* held that Article I 'thus gives those qualified a right to vote and a right to have their vote counted.' (328 U. S. at 570.)

"Almost twenty years before *Wesberry* v. *Sanders* was decided, Mr. Justice Black precisely stated in his dissent in *Colegrove* that Art. I, § 2 requires a State legislature to establish Congressional districts under which '*so far as feasible,* votes be given equally effective weight.' (328 U. S. at 571.) Earlier on that same page the same thought was expressed by use of

the words 'to the extent that it is *practically feasible* (all citizens shall) be given equal representation.'

"The words 'so far as feasible' and the words 'practically feasible' in Mr. Justice Black's *Colegrove* dissent expressed the same idea that became the supreme law of the Land when *Wesberry* v. *Sanders* held that Art. I, § 2 must be taken to mean that congressional districts must be of equal population *'as nearly as is practicable.'*

"After *Baker* v. *Carr*, 369 U. S. 186 (1962), had been decided we do not believe anyone should have been surprised that the dissents in earlier apportionment cases, both congressional and State, would be adopted as the rule of the Supreme Court in cases decided after that landmark case.

"The basic constitutional principle of equal representation established by Art. I, § 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population. Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of *de minimis* is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts.

"Various courts other than the Supreme Court have stated the basic constitutional principle of equal representation applicable to congressional districting in words as unequivocal as those used repeatedly in *Wesberry* v. *Sanders*.

"For example, *Calkins* v. *Hare*, E. D. Mich. 1964, 228 F. Supp. 824 at 829, in which it was held that 'one factor and one alone is controlling, the factor of population.' *Meeks* v. *Anderson*, D. Kans. 1964, 229 F. Supp. 271 at 273, held that 'one factor, and only one, may be taken into account in apportioning and establishing the congressional districts among the people of a state and that factor is population.' And *Bush* v.

Martin, supra, subsequently affirmed by the Supreme Court, in addition to what has already been quoted, stated the applicable constitutional principle still another way: 'Members of Congress are to be elected on the basis of population and nothing else.' (224 F. Supp. at 511.)

"The concept that population and population alone is the sole standard for congressional representation requires that acceptance of invitations to examine population deviations and variations in terms of stated mathematical formulae be limted to discussion of such matters only as they may tend to illuminate the factual situation presented in a particular case.

"When legal arguments are based on the theory that a particular congressional districting scheme is only slightly unconstitutional and should be sustained because the votes of the population of a particular district are, in fact, overvalued and overweighted by 'only' a plus 9.9% deviation and a minus 9.6% deviation, to use the figures involved in this case, such arguments should be, and are in this case, firmly rejected.

" 'We do not propose,' to use the words of Judge Talbot Smith in *Calkins* v. *Hare,* 'to be drawn into a sterile controversy over averages and percentages, whether 9%, 15%, or other.' (228 F. Supp. at 828.) Judge Smith added that the 'as nearly as practicable' words of *Wesberry* v. *Sanders* can not be utilized as 'an escape hatch for the reluctant.' (228 F. Supp. at 829.)

"We believe that *Calkins* v. *Hare* correctly put its finger on the reason why a numbers game cannot be played in ruling the legal questions presented in a congressional redistricting case. That case held:

> We do not measure constitutional rights in these terms. They set up wholly false standards. That the average man gets due process in our courts does not justify railroading some luckless scoundrel every now and then. Nor is it an answer to charge of unconstitutional disfranchisement that only 10,000 people are deprived of their right to vote, this being but a small percentage of the

> entire voting population. These 10,000 have a right to vote equally with others, no matter what percentage of the total they comprise. We take this to be as clear as the proposition that none of our pepole can be denied their free right of worship no matter how small the sect, and that none of our people shall be deprived of their right of free speech, no matter how obnoxious to most of us their doctrines (228 F. Supp. at 828).

"'The short of the matter,' to borrow further the words of *Calkins* v. *Hare,* 'is that a citizen can either vote equally with his peers or he cannot.' 'If he cannot,' that case continued, 'and we find he cannot with respect to congressional elections in Michigan, his constitutional rights have been abridged' and the statute must be held to be unconstitutional. 228 F. Supp. at 828.

"We make the same finding and holding with respect to congressional elections in Missouri under the 1965 Act. We refuse to hold that the constitutional right of equal representation may be but slightly, and therefore permissibly, abridged on the theory that percentage figures and ration numbers make unexplained and substantial population deviations and variances look smaller.

"Any possible doubt that population and population alone is the sole standard for congressional redistricting was removed by recent Supreme Court cases dealing with North Carolina and Maryland congressional redistricting."

Drum v. *Seawell,* M. D. N. Car. 1965, 249 F. Sup. 877; affirmed 383 U. S. 831.

Maryland Citizens Comm. for Fair Cong. Redist. Inc. v. *Tawes,* D. Md. 1964, 226 F. Supp. 80; affirmed by U. S. Sup. Ct. May 31, 1966 (34 Law Week 3406).

Appellees' Motion to Affirm should be overruled, and in light of the admissions contained therein this case should

be advanced on the docket and the decision reversed, and the cause remanded to the trial court with instructions to enter judgment for the Intervening Plaintiffs and Appellants for relief prayed for in their Complaints.

Respectfully submitted,

DOROTHY C. DUDDLESTON,
JOHN P. GALLAGHER,
MILES H. MARSHALL,
LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants.
By BENJAMIN G. COX
and
BUENA CHANEY,
Attorneys for Appellants.

BENJAMIN G. COX,
Attorney at Law,
701 Merchants National Bank Bldg.,
Terre Haute, Indiana,
Telephone: Crawford 6005,

BUENA CHANEY,
Attorney at Law,
33 South Sixth Street,
Terre Haute, Indiana,
Telephone: Crawford 0108,
Attorneys for all Appellants.

PROOF OF SERVICE.

I, Buena Chaney, attorney for Dorothy C. Duddleston, John P. Gallagher, Miles H. Marshall, and Louis Y. Mundy, Intervening Plaintiffs and Appellants herein, and being first duly sworn, upon my oath, depose and say that on the ..... day of August, 1966, I served copies of the foregoing Appellants' Opposition Brief to Appellees' Motion to Affirm on the several parties thereto as follows:

1. Defendants, Roger D. Branigin, Edwin M. S. Steers and James E. Noland, as members of the State Election Board of Indiana, by mailing a copy in a duly addressed envelope with first-class postpage prepaid to John J. Dillon, Attorney General of the State of Indiana, who is the Attorney of Record for said named defendants at his office in the State House, Indianapolis, Indiana.

2. Nelson G. Grills, Plaintiff pro se, by mailing a copy in a duly addressed envelope with first-class postage prepaid to his address of 1669 East Kessler Boulevard, Indianapolis, Indiana.

And further Affiant saith not.

BUENA CHANEY.

STATE OF INDIANA, }
COUNTY OF VIGO. } SS.:

Subscribed and sworn to before me, a Notary Public in and for said County and State, this ..... day of August, 1966.

Witness my hand and seal.

LAEL D. HIRE,
Notary Public.

My commission expires: May 22, 1967.